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ABSTRACT

This document analyzes the Supreme Court decision in the Allan Bakke case. Primary emphasis is given to outlining the uncertainties and ambiguities remaining in the wake of the Court's findings that racial and ethnic quotas are not constitutionally acceptable, although race can be a valid factor in applying affirmative action remedies. Reference is made to the influence that the Bakke decisions might have on cases now pending which challenge the validity of affirmative action policies which discriminate against whites. Particular concern is expressed for the potential impact these decisions might have on Jews. Some of these court cases are described in detail. Pending action affecting disadvantaged students and supported by Jewish groups is discussed. Black support and criticism of the Bakke decisions and other court action concerning affirmative action policies are also discussed. Criticism is directed against specific actions that have denied equal education and protection for ethnic and racial minorities. In addition, a strong argument is made for the need to help all disadvantaged groups, and for the elimination of solutions that are "simple, easy and wrong," such as racial and ethnic "quotaism." (Author/EB)

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BAKKE'S IMPLICATION

SAMUEL RABINOVE

No recent decision of the United States Supreme Court has been so eagerly awaited as was the decision in the Bakke case. And none, once rendered, has left quite as much confusion and controversy in its wake. As any number of commentators have already pointed out, the one virtually certain result of the Bakke decision will be a substantial increase in the amount of litigation in the months and years ahead.

What did the Court say—or try to say? And what, if anything, does the decision portend for the Jews of America, who have been among the most interested in the issues of quotas and affirmative action?

Nine Justices, six opinions, two specific judgments. As announced by Justice Powell, the judgment *affirmed* the decision of the California Supreme Court to the extent that it held the special admissions program at the Medical School of the University of California at Davis to be unlawful and directed that Allan Bakke be admitted to the Medical School. At the same time, the judgment *reversed* the California Supreme Court ruling to the extent that that Court had barred the Medical School from giving any consideration to race in its admissions process.

Justice Powell was the key to the two decisions, joining with four of his colleagues in the affirmation and joining with the other four in the reversal. The two quartets disagreed sharply with each other, and there was considerable diversity in the approach to their position of the group (Brennan, White, Marshall and Blackmun) who endorsed the use of race in admissions programs. Each of these four wrote a separate opinion—as did also Justice Stevens (joined in his by Burger, Stewart and Rehnquist).

What was the gist of the Powell argument? In finding for Bakke, Powell places great emphasis on the Equal Protection Clause of the Fourteenth Amendment. He stresses repeatedly that this constitutional protection is guaranteed to all individuals regardless of racial or ethnic origin. "The fatal flaw in petitioner's preferential program," he reasons, "is its disregard of individual rights as guaranteed by the Fourteenth Amendment." At the same time, however, he holds that race may be taken into account in the admissions process, since educational diversity is a valid educational objective, and since the use of race as one factor (among others) helps to promote diversity. He seeks caution here: "Ethnic diversity . . . is only one element in a range of factors a university may properly consider in attaining the goal of a heterogeneous student body." An admissions program such as that in question at Davis, one "focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity." Moreover, the promotion of diversity is to be distinguished from preference. "We have never approved preferential classifications in the absence of proved constitutional or statutory violations." (There was no such violation at Davis—specifically, there was no history there of racial discrimination.) A university is permitted to seek diversity, so long as its admissions process "treats each applicant as an individual."

In the opinion written by Justice Stevens, he and the three Justices who joined with him argued for Bakke's admission on narrower grounds. The California Supreme Court had based its decision on the Equal Protection Clause, but the Stevens quartet based their judgment squarely on Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the ground of race, color or national origin in any program or activity receiving Federal financial assistance. It is the Court's "settled practice . . . to avoid the decision of a constitutional issue if the case can be fairly decided on a statutory ground." Accordingly, this group is silent on the question of whether race can be used at all, even in a limited way, as a factor in the admissions process. One may imagine what they might have said, but what they actually said was nothing; in their view, that question was not before the Court.

The other quartet disagreed with Powell regarding Bakke's admission, and agreed with him regarding the use of race—except that they felt he had not gone nearly far enough in legitimizing racial considerations in the admissions process. The Brennan opinion, in which White, Marshall and Blackmun joined, rejected the Powell conclusion that the special admissions program at Davis is unconstitutional. They held that "we cannot and . . . need not under our Constitution or Title VI . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens." So long as remedial action does not violate the Fourteenth

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ıment, preferential treat-
racial minorities is accept-
short, one need not hide
.acial preference behind the disguise of ethnic diversity; one need not say that race may be only one of many factors taken into account. One is permitted, constitutionally, to endorse the use of race explicitly "where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the medical school." On that basis, this group upholds the racial and ethnic quota scheme employed by Davis.

Justice Powell takes sharp exception. He argues that the denial to Bakke of his "right to individualized consideration without regard to his race is the principal evil of" the Davis program, and chides his brethren in the pro-quota camp for ignoring that denial entirely in their opinion.

It is difficult to elicit clarity from the 154 pages of opinions which were handed down. But some things are clear. The fears expressed by many in the civil rights movement that the Supreme Court would use the Bakke case as an instrument to destroy affirmative action were unfounded. However ambiguous the decision, and however much difficulty admissions officers may have in being guided by it, affirmative action has been held permissible. What is not permissible—as far as university admissions are concerned—is the use of racial and ethnic quotas where there has been no finding of past discrimination on the part of the institution involved. Obviously, the fact that the Court did not specify precisely the extent to which race may be taken into account will create problems. But five Justices cited with approval the Harvard College Admissions Program, which in fact reflects what many other universities have been doing—and are likely, therefore, to continue to do. Some will think this merely an excuse for preferential treatment, masquerading as ethnic diversity; others will think it a wholly inadequate response to the continuing problem of discrimination. But the upshot is most likely to be a system very much like that we have come to know, a system which has caused some dislocation for individual Jews and other whites, but has not led to disproportionate penalty to any one group.

The implications of the decision for Jews in employment situations are considerably less clear. There are numerous cases now pending in lower courts which challenge the validity of various forms of affirmative action in employment and business on the ground that they discriminate against whites. In a significant ruling on July 3, the Supreme Court without any recorded dissent declined to review (and thereby let stand) a U.S. Court of Appeals decision which upheld the validity of a 1973 consent decree that required the American Telephone and Telegraph Company to hire and promote more blacks and women. The affirmative action program embodied in that decree was challenged by three unions which charged that the agreement violated some of their members' cherished seniority rights, won in collective bargaining and incorporated in their contracts with AT&T. While the Court's refusal to disturb the ruling in the AT&T case does not establish any firm legal precedent, it does indicate that the Justices are not disposed to reject far-reaching affirmative action plans, even though they may entail some cost to white males, in employment situations where there has been evidence of past discrimination.

Some Jewish employees, of course, may well be hurt by the implementation of such plans. On the other hand, affirmative action can also be a useful weapon in situations where there has been discrimination against Jews. This happened recently in Philadelphia as a result of a complaint filed by the American Jewish Committee against the Provident Mutual Life Insurance Company, which was required by the Pennsylvania Human Relations Commission to seek to meet reasonable goals and timetables for hiring and promotion of Jews.

The Supreme Court may soon have still another opportunity to clarify affirmative action law in the employment sphere. In the case of *Weber* v. *Kaiser Aluminum and Steel Company*, a U.S. Court of Appeals struck down a one-to-one racial hiring quota for a job training program, set up by the company on a voluntary basis as part of an affirmative action plan, on the ground that past discrimination had not been established.

The plaintiff had charged that the scheme discriminated against him as a white under Title VII of the Civil Rights Act of 1964. If the Supreme Court agrees to review this case, it will confront the problem of how to reconcile two of its prior decisions in job discrimination cases with its decision in *Bakke*.

> The quest for "diversity" may well affect adversely members of groups which tend to be "overrepresented."

In the 1971 case of *Griggs* v. *Duke Power Company*, the

Supreme Court unanimously construed Title VII to mean that "discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed," and that Congress had made job qualification "the controlling factor, so that race, religion, nationality and sex become irrelevant." And in *McDonald* v. *Santa Fe Trail Transportation Company* in 1976 the Court, again unanimously, ruled that Title VII protects whites on the same basis as it protects blacks. Both *Griggs* and *McDonald*, therefore, tended to uphold color blindness under the Civil Rights Act. Yet in *Bakke*, five of the Justices agreed that race may be a "plus" factor, even in situations where there is no prior history of discrimination. How the Court may attempt to resolve this apparent dilemma should be of surpassing interest. In a different context (namely, the Court decisions on the death penalty) Chief Justice Burger recently commented, "The signals from this Court have not always been easy to decipher."

On the day after the Supreme Court rendered its decision in *Bakke*, while some black leaders reacted guardedly and others even found reason for encouragement, the influential black weekly, the New York *Amsterdam News*, headlined the event as follows: "Bakke: We lose!!" The paper then proceeded to analyze the impact of the decision, concluding that it "also has jeopardized every affirmative action program in the country, not only in colleges and graduate schools, but also in private business and industry," and went on to say that the fact that "blacks have now lost the case may further divide blacks from Jews at the national and local levels." Perhaps this attempt to snatch defeat from what was at least a measurable victory for black people may be excused as an ill-advised, impulsive response. Yet the reaction of the *Amsterdam News* is important because it epitomized the intensity of feeling on the part of many blacks in support of quotas and racial preference, as well as their conviction that the Jews have betrayed them on this vital issue. To convince such persons that they are in error is not easy. Still, it may well be maintained that the Court's rejection of quotas at Davis Medical School, in the long run, will advance the interests of black people further than if the Court had upheld such quotas. For one thing, there is much truth in the argument of black economist Dr. Thomas Sowell that the message of quotas "loud and clear, is that black people just don't have it," that quotas signal "incompetence, and black achievement becomes synonymous with charity or payoffs." For another, there is no question that the overwhelming majority of the American people are opposed to quotas and to any absolute preference based on race or ethnicity, as being antithetical to equal opportunity. In fact, the Gallup Poll taken in March 1977 revealed that 64 percent of even non-white participants in the survey expressed opposition to preferential treatment in higher education and employment for minority group members and favored use of ability criteria as measured by tests, notwithstanding past discrimination. Since "quotaism" is so heavily opposed by the public at large, even if it were to be ratified by the Supreme Court, its utilization would serve to further polarize our society, as well as to discredit other types of affirmative action which are more acceptable.

Most Jews, for example, while quick to express their strong aversion toward quotas, seem prepared to be supportive of other reasonable, less drastic affirmative action measures to rectify the consequences of past discrimnation. Certainly that was the posture adopted by the major Jewish organizations in the friend-of-the-court briefs they filed in the Supreme Court on the side of Bakke. By way of illustration, among the affirmative action measures endorsed by the American Jewish Congress and the American Jewish Committee (together with six white ethnic organizations) in their *amicus* brief were: expanded recruitment, remedial programs for disadvantaged students at all levels of the educational process, as well as a "plus" factor for disadvantaged medical school applicants who have demonstrated the capability of overcoming the handicaps of racial discrimination or poverty. The brief filed by the Anti-Defamation League, Jewish Labor Committee and National Jewish Commission on Law and Public Affairs, supported, among other things, "experimentation with nondiscriminatory approaches to University admissions that will afford the disadvantaged in our society better access to a higher education and the professions."

The Congress/Committee brief urged, moreover, that medical schools evaluate college grades and aptitude test scores in the light of a candidate's background: whether he or she came from a culturally impoverished home, the nature and quality of schools attended, leadership ability and evidence of high motivation such as volunteer work among the sick or underprivileged. In sum, the briet stressed the importance of considering the total life experience of each individual applicant in order to assess accurately the applicant's merits, specifying most of the very same criteria set forth by Justice Powell in the course of his endorsement of consideration of race as one factor which properly may be considered by a college or university.

The Congress/Committee brief, however, emphasized disadvantage, whether caused by discrimination or other factors, not diversity. Under the criteria urged in this brief, the hypothetical son of black Secretary of the Army Clifford Alexander, for example, himself a graduate of Fieldston, Harvard College and Yale Law School, would not receive any special consideration based on race. Yet, under Justice Powell's criterion of diversity, professional schools in effect are encouraged to enroll such an applicant to promote racial diversity. In fact, there is considerable evidence that many, if not most, of the black students admitted preferentially in recent

years to Harvard College come not from economically or culturally disadvantaged backgrounds, but rather from comfortable, middle class homes.

The problem with Justice Powell's approval of the objective of "diversity," which is perhaps appealing on its face, is that it can so readily be misused to grant *de facto* preferences to applicants whose capabilities, as measured by almost any yardstick, are substantially below those of others who are rejected because they do not promote diversity. In fact, that is essentially what happened, at least to some degree, at the Davis Medical School, though that school went much further than Powell could approve by openly conferring preferences on blacks, Chicanos, Asians, and American Indians only, under a fixed two-track system with lower standards for the preferred groups.

Depending on how it is implemented, then, the quest for "diversity" may well affect adversely members of groups, such as Jews, which for various historical and cultural reasons, tend to be "overrepresented." If, after all, it is important to enroll a representative cross-section of American society, "diversity" could easily spill over into a design for a rough proportionality, or what is tantamount to "quotaism." A professional school might reasonably conclude, for instance, that it has too many students from the northeastern part of the country and needs more Idaho farm boys or Appalachian coal miners' daughters to improve its geographic mix. Similar judgments have been made by universities in the past, to the detriment of New York Jews. Carried to a logical extreme, it is that kind of approach that could again restrict opportunities for Jewish students, who reside disproportionately in the northeast and who are rarely found on farms or in coal mines.

A good many of those in the pro-Bakke camp were and are "closet" racists.

But Justice Powell, of course, was not thinking merely of geographic diversity "to promote beneficial educational pluralism." He specifically mentioned that admission of an Italian-American applicant, for example, might be deemed to help an institution achieve that objective. Actually, it is apparent that many of the non-Jewish white ethnic groups are presently "underrepresented" in the learned professions. If achieving group proportionality comes to be seen as a desirable societal goal, this could hardly augur well for the 2.7 percent of the population who identify as Jews.

The danger was dramatically demonstrated by an episode last November, when New York state Senator John Calandra complained that while Italian-Americans comprise 25 percent of the City University student body, they hold only four percent of the faculty posts.

"Every other ethnic group starts yelling about quotas," he said, "I want the Italo-Americans to get what everybody else has. Otherwise I'll fight their budget in Albany."

A few years ago, in the job discrimination suit of *NAACP* v. *Imperial Irrigation District*, a Federal judge in California approved a Consent Decree which required the employer not merely to hire and promote blacks and Chicanos at all job levels in proportion to their numbers in the general population of the county, but also all *other* racial and ethnic groups in its employ in proportion to their numbers in the county population. The target date for achieving this affirmative action program is January 1, 1984.

Now that the Court has struck down quotas where past discrimination has not been proved, should Jews continue to be troubled or ambivalent (as so many have been) about affirmative action in general? It depends. Many affirmative action programs are sound enough in concept and fair enough in practice to warrant strong endorsement, particularly those that include a training component. Regrettably, though, and all too frequently, in others the distinctions between quotas, outright preferences for poorly qualified persons, goals and other forms of affirmative action have been disregarded or smudged. This tends to make affirmative action appear odious. But what it really shows is that any affirmative action program deserves to be scrutinized carefully, as well as sympathetically, in terms of its actual effects.

A personal note: In the course of several years of laboring in the vineyard of affirmative action in general and of the Bakke case in particular, it has become clear to me that a good many of those in the pro-Bakke camp were and are "closet" racists, people who do not really want to help blacks, Hispanics or Native Americans. Some are of the same ideological bent as those who, for so many years, accepted with equanimity, if not approval, the pervasive rejection and exclusion of people of color from everything good in American society. In their meanness of spirit, they are inclined to blame the victims for their plight and to begrudge them any compensatory or remedial help whatever to enable them to overcome their genuine handicaps. Others secretly share the contemptible views of Dr. William Shockley that blacks, on the whole, are inherently inferior to whites in intelligence and nothing can or should be done about this.

Still others point out that, in contrast to the relatively low average achievement levels of black students, Asian Americans have demonstrated high upward academic mobility, that children and grandchildren of Chinese and Japanese immigrants, almost all of whom came here in dire poverty, who faced an acute language barrier as well as pervasive exclusion and discrimination on the part of the dominant white society, nevertheless have managed to compete successfully with whites in very substantial numbers for openings in medical and other professional schools. In responding to this type of argument it is necessary to stress, as Justice Marshall did in his eloquent opinion in *Bakke*, that no other ethnic group in this country was enslaved, with the multiple afflictions that that has meant for the descendants of the enslaved.

In his Forward to *Minorities in Medicine* by Dr. Charles E. Odegaard, published in 1977, Dr. John Z. Bowers stated: "Enough qualified minority group applicants are simply not available." The basic reasons why there are too few qualified black medical school applicants, of course, are to be found in the total historical and cultural experience of the black people. It is also true, however, that a sub-reason for this condition is that too few black pupils and students have studied hard enough to overcome their deprivation. Not enough black college students, for example, undertake the tough mathematics and science courses that are prerequisite to medical school admission. Insufficient study may be explainable in part in terms of disproportionate numbers of severely troubled black home situations and consequent demoralization of so many young people who have to struggle just to survive. But it is important to acknowledge that it is a reality and then to do something constructive about it, in order for the necessary remedial efforts to be effective.

Hence it is worth noting, and respecting, those black spokesmen who have been appearing in inner-city schools and neighborhoods throughout the country to call upon students, teachers and parents to join in programs to upgrade black student achievement levels. They have stressed the importance of establishing high academic standards and the need for attaining self-discipline as the path to meeting such standards. Their demanding message reportedly has been greeted with enthusiasm, including their attacks on those elements of the contemporary "youth culture" which feature the escape mechanisms of alcohol, drugs and sex rather than scholastic achievement.

H. L. Mencken is reputed to have said that there are some problems for which there are solutions that are simple, easy—and wrong. How to help all the disadvantaged to actualize their full potentialities and to take their rightful places within the mainstream of American society is a complicated problem indeed. The solution that is simple, easy—and wrong—is racial and ethnic "quotaism." As for the Bakke decision, perhaps future Supreme Court rulings will more clearly reveal its contours and its full implications for Jews, as well as for everyone else. ✱

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